IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1529 OF 2005
IN
SUIT NO. 1571 OF 2004

S.K. Networks Company Ltd. ... PLAINTIFF
V/s.
M/s. Amulya Exports Ltd. & Ors. ... DEFENDANTS

None for plaintiffs
Mr. V.K. Rambhadran for defendant Nos. 3 & 4.
Ms. N. Sumnani i/b. M/s. Bhatt and Saldhen for defendant No. 5.

CORAM : ANOOP V. MOHTA, J.
DATED : 24th March, 2006

P.C.

. This Notice of Motion has been taken out by the applicants, original defendant Nos. 3 & 4 and prayed as under :-

Clause (a) - That the above suit be dismissed for want of jurisdiction against the third and fourth Defendants.

Clause (b) - In the alternative the suit be dismissed as the same is barred by law of limitation.

2. By an order dated 24th January, 2006 in Chamber Summons No. 1391 of 2005 taken out by defendant Nos. 3 & 4 for revocation of leave granted by an order dated 24-04-2004 under Clause XII of Letters Patent was dismissed and observed as under :-

"5) Firstly according to defendant No. 3 & 4 themselves there is no privity of contract between the plaintiff and defendant Nos. 3 and 4 based on this bill of lading. In the circumstances, the above clause regarding jurisdiction cannot operate between

the Plaintiff and Defendant No. 3/Defendant No.4."

"7) The plaintiff's case inter-alia is that false boarding dates had been deliberately put on the bill of lading issued by defendant No. 3 and 5 with respect to the said consignment to avoid their obligations to the plaintiff. As a result thereof, according to them, they were unable to negotiate a letter of credit. The buyers in China refused to make payment under the letter of credit as the date of the shipment was beyond the date specified in the letter of credit. With the merits of this contention, I am not concerned at this stage. What is relevant is that the Plaintiff has expressly pleaded that the dates were falsely put on the bill of lading and that the defendants jointly and severally connived in perpetrating the fraud and had also committed breach of trust."

3. In view of this and as the submission are made in respect of prayer clause (b) only, the matter proceeded accordingly.

4. The plaintiff and respondents have filed the present suit against defendants, basically for the damages on account of late delivery of the goods and also for additional losses incurred by the plaintiff because of revocation of contracts with the Chinese buyer. The respondents have raised claims against respective defendants separately as well as jointly. This prayer clauses of the plaint are as under :-

a) This Hon'ble Court be pleased to order and decree the Defendants jointly and severally for the sum of USD 506, 635.93 equivalent to INR 2,22,91,980/- along with interest @ 12% for the period 21st April, 2003 to 21st April 2004 amounting to USD 60,796 equivalent to INR 26,75,024/- as per particulars of claim being Exh. "P".

b) this Hon'ble Court be pleased to order and decree the Defendant Nos. 1 and 2 for the sum of USD 506,635.93 equivalent to INR 2,22,91,980/- as per particulars of claim being Exhibit "P".

c) this Hon'ble Court be pleased to order and decree the Defendant Nos. 3 and 4 for the sum of USD 229,931.99 equivalent to INR 1,01,17,007/- as per particulars of claim being Exhibit "P".

d) this Hon'ble Court be pleased to order and decree the Defendant No. 5 for the sum of USD 276,704.14 equivalent to INR 1,21,74,982/- as per particulars of claim being Exhibit "P".

e) this Hon'ble Court be pleased to order and decree the Defendants for the sum of USD 50,663 equivalent to INR 22,29,172/- as per particulars of claim Exhibit "L".

f) this Hon'ble Court be pleased to order and decree the Defendants for the sum of USD 50,000 equivalent to INR.

g) this Hon'ble Court be pleased to order and decree the Defendants for the sum of USD 25,000 equivalent to INR 11,00,000/- as per particulars of claim Exhibit "O".

f) for such other and further reliefs as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

g) for costs of the suit.

5. The sequence of events that lead to filing of the suit are as under :-

(1) "Plaintiff is a well known and reputed company incorporated in and under laws of Korea having its registered office at Seoul. The plaintiff is in the business of import and export and deals with steel and other such related raw materials. The plaintiff

company was earlier known as S.K. Global Company Limited and now changed as S.K. Network Limited. In first week of January, 2003, the negotiations took place between the plaintiff and defendant Nos. 1 & 2 for export of 4000 M.T. Cold Rolled Steel Sheets in Coils from defendant No. 1 to the plaintiff. An offer was accordingly made on 9th January, 2003. Based on that defendant No. 1 sent their proforma invoice under the cover of letter dated 15th January, 2003 to the plaintiff. The entire description of the goods was worth a total amount of US$ 1,938,400. The said proforma invoice recorded J.N.P.T. (Mumbai) as port of loading and Shanghai as port of discharge and final destination. The time was the essence of contract. As per the plaintiff, said goods were procured for a buyer in Shanghai, China and therefore the port of discharge was stated to be Shanghai instead of port in Korea. Some of the details of the terms and conditions of contract as mentioned in proforma invoice are as follows" :-

Prices	- C & F Shanghai
Shipment	- Material shall be shipped from any Indian Port before March, 2003 after receipt of L/C. Partial shipment and transshipment to be permitted. However, a direct B/L shall be provided. Delivery

subject to the availability of Vessel/Force Majeure conditions (Break bulk or in containers).

Payment terms - By a confirmed and irrevocable letter of credit, without recourse to the drawers, payable at sight in favour of AMULYA EXPORTS LTD. Unrestricted for negotiation, L/C should be valid up to 31.03.2003 for shipment and further 21 days for negotiation. All bank charges, outside India are to be on buyer's account.

Validity - This Proforma Invoice is valid for establishment of L/C up to 20.01.2003.

6. The plaintiff subsequently opened letter of credit dated 20th January, 2003 with the Korea Exchange Bank, Business Division for an amount of US$ 1,938,400 in favour of defendant No.1. As per the plaintiff, defendant Nos. 1 & 2 were aware that the goods were meant to be further sold to a buyer in China by the plaintiff and therefore, defendant No. 1 instructed defendant Nos. 3 to 5 to directly transport the goods to Shanghai. As per the said letter of credit, goods were to be put on Board from any Indian port for transportation to Shanghai, China and last date for such shipment was 31st March, 2003. In the meanwhile, defendant No. 1 & 2 made arrangements to transport 1045 M.T. of cold rolled steel sheets worth USD 506,635.93 to Shanghai in

partial fulfilment of the proforma invoice/contract dated 15th January, 2003 which was for 4000 MT cold rolled steel sheets amounting to total USD 1,938,400. Defendant No. 1 & 2 decided to divide the entire consignment between two ships. One ship namely Tower Bridge carrying goods worth USD 229,931.99 and the other ship being L.B. Shastri carrying goods worth USD 276,704.14.

7. Defendant Nos. 1 & 2 therefore hired services of defendant No.3 as forwarding agent with respect to transportation of one consignment being to the tune of USD 229,931.99 abroad the vessel, Tower Bridge and the same was actually to be performed by defendant No. 3 which was its agent in India.

8. Defendant No. 3 as alleged liable for the acts of its agent, namely the defendant No.4. Defendant No. 5 was hired as shipper by defendant No. 3 in respect of the said consignment worth of USD 229,931.99. The other consignment worth of USD 279,704.14 was entrusted directly to the Shipping Corporation of India, defendant No. 5 herein to be transported to Shanghai.

9. As referred above and as per the terms of the letter of credit dated 20th January, 2004, the consignment of Steel goods was to be put on Board by

defendant No. 1 & 2 latest by March 31, 2003 and plaintiff was to be intimated about the same latest by 7th April, 2003. The plaintiff, however, received no information regarding the boarding of the consignment even after 7th April, 2003. There was no communication whatsoever received from defendant Nos. 1 & 2 inspite of the repeated efforts by the plaintiff.

10. The China buyer, therefore, with whom plaintiff had entered into a separate contract to sell the said steel goods, ultimately, as no information was forthcoming, rescinded the contract. The plaintiff, therefore, terminated the contract with defendant No. 1 & 2 vide E-mail dated 14th April, 2003 addressed to defendant No.2. The plaintiff called upon defendant No. 1 & 2 to take steps to dispose of the cargo and indemnify the losses incurred to them.

11. Surprisingly, on 21st April, 2003 the consignment of steel goods arrived in Shanghai and the plaintiff received the shipping advice and other documents from its Bank. On enquiry, the plaintiff discovered that as per the Bill of Lading issued by defendant No. 5, said goods were put on board on 31st March, 2003 itself. As a result of the said date on

the Bill of Lading (for short "BOL") the plaintiff could not deny payment to defendant No.1. The plaintiff as per the letter of credit could not stop payment to the negotiating bank of defendant. That resulted into huge losses to the plaintiff, who had to make good the contracted amount to the issuing bank. The plaintiff had also suffered additional losses on account of cancellation of the order of the Chinese buyer.

12. The plaintiff later on discovered that the boarding date on the BOL issued by defendant No. 5 i.e. Shipping Corporation of India Ltd. was false and that the goods had left the Indian port much after 31st March, 2003. Therefore, there was no question of plaintiff’s goods having been loaded on 31st March, 2003. As per plaintiff the vessel L.B. Shastri arrived at the loading port on 1st April, 2003 and left the port to sail for Shanghai on 4th April, 2003. Thus, Terminal Departure Report of the vessel Tower Bridge reflected that said vessel had arrived at Mumbai port on 8th April, 2003 and left the port for sailing to Shanghai only on 10th April, 2003. Therefore, as alleged, there was no possibility of the goods being put on board on 31st March, 2003.

13. The plaintiff upon discovery of these

discrepancy in the shipping documents and in the BOL, wrote a letter dated 19th May, 2003 to defendant No. 1 & 4 and informed about the various breaches of contract and the loss suffered.

14. The plaintiff, based on this foundation of fraud and forging of documents has filed present suit dated 4th May, 2004 which was declared at Delhi on 4th May, 2004. The leave in the present suit was obtained on 5th May, 2004.

15. In this background, applicants-defendant Nos. 3 & 4 have taken out the present Notice of Motion. None appeared for the plaintiff. Heard learned Counsel for defendant Nos. 3 & 4 and defendant No. 5. Perused the affidavit and documents filed by all the parties.

THE RELEVANT PROVISION :-

16. The (India) Carriage of Goods by Sea Act, 1925 (Sea Act) has been relied on by the learned Counsel appearing for defendant Nos. 3 & 4, in support of the Notice of Motion as a legal foundation. This Act deals with the carriage of goods by sea. Undisputedly, the provisions of Sea Act is applicable to the facts of this case. This Act has a foundation of the International Conference of Maritime Law held at Brussels in October, 1922 for unification of

certain rules relating to the bills of lading. Said rules were amended from time to time. The provisions of this Act have a force of law with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading. It is extended to whole of India.

17. The relevant Section/Provision as relied & referred in the Appendix B - Schedule - Rules relating to bill of lading, Article III - (Clause 6) is as follows :-

> In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. [Thus period may, however, be extended if the parties so agree after the cause of action has arisen:
>
> Provided that a suit may be brought after the expiry of the period of one year referred to in this sub-paragraph within a further period of not more than three months as allowed by the court].
>
> In the case of any actual or apprehended loss or damage, the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

THE SUBMISSIONS :-

18. Relying on this, the learned Counsel for the

applicant submitted that in the present case as admittedly the leave was obtained on 5th May, 2004 and suit itself was declared at Delhi on 4th May, 2004 and as admittedly the cause of action arose based on the BOL on 21st April, 2004, the present suit is time barred. He further contended that as the transaction based on the International practice of BOL, such provisions need strict interpretation. Therefore looking to the international characteristic of the provisions, it should be construed strictly. He relied on **AIR 1960 Supreme Court, 1050 - East & West Steamship Co. Georgetown, Madras V/s. S.K. Ramlingam Chettiar.** He further contended that in view of provisions of Order VII Rule 11 of the Civil Procedure Code, 1908 (CPC) and as observed by the Apex Court in **Saleem Bhai & Ors. V/s. State of Maharashtra, 2003, 2006(5) Bom. C.R. 454**, it is necessary to decide this issue before any direction for filing the written statement by the defendants, as it goes to the root of the matter. He therefore pressed for the hearing of this Notice of Motion before passing any further order or direction to file written statement.

19. In the case of Saleembhai (Supra), in view of Order VII Rule 11 of C.P.C. the Apex Court has

observed that it is necessary for the Court to frame issues on law and facts arising out of pleadings. The Trial Court should record its findings on the preliminary issues in accordance with law before proceeding to try the suit on facts. In the facts and circumstances of a case, the Court may consider the very nature of the relief claimed after considering the issues involved in the suit and pass order on application under Order VII Rule 11 of C.P.C. Therefore, it is necessary for a Court to decide the application under Order VII Rule 11 of CPC, based on the allegations in the plaint without insisting for filing of written statement by the contesting defendants.

20. He further contended that the defence of any sort in the written statement would be wholly irrelevant in view of the averments in the plaint itself. Therefore, there is no question of filing written statement without deciding the application under Order VII Rule 11. The insistence on filing the written statement without deciding application under Order VII Rule 11 of CPC would be procedural irregularity touching the exercise of jurisdiction by the Trial Court. The Apex Court in Saleembhai’s case (Supra) remanded the matter back to decide the

application under Order VII Rule 11 on the basis of the averments in the plaint. Both the Courts had rejected said application under Order VII Rule 11 of CPC and directed the parties to file the written statement.

21. In view of this, as the averments in the plaint are germane and sufficient to consider the case of defendant No. 3 & 4 that the suit is barred by the Law of Limitation.

22. A BOL is well defined, interpreted and recognized term in any sort of trade, commerce and business at national or international level.

23. The Transportation of Goods Act, 1993 (Act 28 of 1993) came into force on 16th October, 1992 which provides for regulation of the multimodal transportation of goods from any place in India to a place outside India, on the basis of multimodal transport contract and for a matter connected there with. This Act of 28 of 1993 deals with mode of transport including carriage of goods by road, rail, in-land, water way or sea. This further deals with the term multi modal transportation, which means carrier of goods by two more modes of transport from the place of acceptance of the goods in India to a place of delivery of the goods outside India. By this

Act, amendment has been made to the Indian Carriages of Goods by Sea 1925 (26 of 1925) in part 2. The relevant amendment is underlined while reproducing clause 6 of the rules of bill of lading. This Act further provides and deals with multimodal transport contract and transport operator and determine also along with other Sea Act and other Acts. The liability and responsibility is of multimodal transport operators for loss of damage to the goods. It further simplifies the procedure with a view to reducing and eliminating interpretation in the continuous movement of the goods from the original to the ultimate destination as also reducing cost and delays and improving the quality of transport services. The liability and responsibility of the multimodal transport operator who provides service under a single document need to be acknowledged in the international trade. The present transaction and issue therefore need to be considered based on these two Acts.

24. Looking to the aims and objects it is necessary to interpret and consider the provisions of the Sea Act. Keeping in mind the principles of trade and commerce of national & international level and/or standard, in such transactions/contracts. A strict

interpretation must be given. The mandate of such Act, if worded clearly, interpretation which support the scheme of the Act needs to be given. The international trade and commerce need to be governed by uniform standard and practice. An uncertain & vague interpretation & practice will hamper free flow of trade and business at national or international level.

25. The learned Counsel for defendant Nos. 3 & 4 relied on the Apex Court's decision **(East and West Steamship Co. Georgetown, Madras V/s. S.K. Ramlingam Chettiar)** a part of which is quoted below:-

> The distinction between the extinction of a right and the extinction of a remedy for the enforcement of that right, though fine, is of great importance. The Legislature could not but have been conscious of this distinction when using the words "discharged from all liability" in an Article purporting to prescribe rights and immunities of the shipowners. The words are apt to express an intention of total extinction of the liability and should, specially in view of the international character of the legislation, be construed in that sense. It is hardly necessary to add that once the liability is extinguished under this clause, there is no scope of any acknowledgment of liability thereafter.
>
> We have therefore come to the conclusion that whatever be the proper mode of ascertaining the date when delivery "ought to be made" under Art. 31 of the Limitation Act - whether that be the reasonable time for delivery in the

> circumstances of the case or the date when after correspondence the carrier intimates its inability to deliver or the date of the final repudiation of the claim on the claim for compensation having been made or in the case of part delivery the date when the bulk of the consignment was delivered - the date when the goods should have been delivered for the purpose of the Third Clause of the 6th paragraph of Art. III of the Act is the date when the ship by which the goods were contracted to be carried has left the port at which delivery was to be made.
>
> Though the additional defence raised by the shipping companies must therefore fail, the main defence, as we have already found, succeeds. None of the suits were brought within a year from the date when the ship carrying the goods left the port of discharge. We therefore dismiss with costs and Civil Appeals Nos. 91 and 92 of 1958 and confirm the order of dismissal made by the Bombay High Court. One set of hearing costs will have to be paid.

we have to consider the facts and averments made in the present case.

26. The plaintiff in his reply affidavit has raised a specific defence and made an allegations of fraud being played by defendant No. 1 by putting false date on BOL and presented the Letter of Credit (LOC) and obtained payment at Mumbai on the basis of such antedated BOL. The plaintiff further disputed the jurisdiction clause as mentioned in the BOL of defendant Nos. 3 & 4 and further contended that BOL

including the jurisdictional clause is vitiated by fraud. He further contended in the affidavit that ships that carried the respective goods were not actually in India on the relevant date i.e. 31st March, 2003. He therefore denied a period of one year for bringing a claim as applicable or relevant in the facts and circumstances of the case. The plaintiff further submitted that the claim is not under the bill of exchange but in respect of BOL on the basis that it was fraudulently issued with false date. The main emphasis of the plaintiff is on the three years period of limitation mentioned under the Limitation Act, 1963, as per entry 10 part II of the schedule and other provisions. It has been further contended that the suit has been filed within limitation from the date of knowledge of act as found committed by the defendants, after verifying the documents and particularly BOL and shipping advice upon received by them from the bank on 25th April, 2003. Hence, he further contended that the limitation period started from the date on which the plaintiff came to know about the fraud.

THE REASONING :-

27. It is mandate of the act that the carrier and the ship shall be discharged from all liabilities in

respect of loss or damage unless suit is brought within one year after delivery of the goods or **the date when the goods should have been delivered.** The period however would be extended **if the parties so agreed after the cause of action has arisen.** The proviso further provides that a suit may be brought after the expiry of the period one year referred above with a further period not more than three months by the Court.

28. In the present case admittedly suit was filed after one year from the date when goods should have been delivered. In the present case as offered goods in view of terms and conditions should have been shipped from any Indian port before March, 2003 and in view of proforma invoice dated 15th January, 2003 and upon letter of credit dated 20th January, 2003 with the Korean Bank, the goods should have been put on board from any Indian board for transportation to Shanghai, China latest by 31st March, 2003. The said letter of credit dated 20th January, 2003 was between plaintiff and defendant No.2. Defendant No. 1 & 2 as alleged not intimated about the shipping/consignment of the steel goods even by 7th April, 2003. As per the plaintiff, on 14th April, 2003 they terminated contract with defendant Nos. 1 & 2. On 21st April,

2003 after termination of the contract, the consignment arrived at Shanghai and plaintiff received the shipping advice from the bank along with other documents and there they discovered that as per the BOL issued by defendant No. 5, said goods were put on board on 31st March, 2003. The plaintiff thereafter could not deny payment to defendant No. 1 and or unable to stop payment to the negotiating bank of defendant No. 1. That resulted into huge losses in question.

29. Under normal circumstances and based on the above averments in the plaint, the date of delivery of the goods was 31st March, 2004. There is nothing on record to suggest or even averred by the plaintiff that any period was agreed by the parties to be extended after the cause of action. In the present case the cause of action arose on 1st April, 2003 or atleast 7th April, 2003 itself. The suit should have been brought within one year from the said date of delivery. The proviso, cannot be read in isolation. Therefore, if parties agreed after the cause of action arose to extend the period then only suit may be brought after expiry of the period of one year, within and further period of more than three months as allowed by the Court. The agreement between the

parties to extend the period beyond one year therefore is a must. Such agreement may be implied or oral as there is no condition of written statement. If there is no agreement between the parties for such extension, the Court cannot on its own extend the period for more than three months after the expiry of the period of one year as referred above.

30. By the said Act of 29 of 1993 in Schedule-Part II the underlined portion has been incorporated. Prior to the amendment, the limitation to file such suit was one year after the delivery of the goods or after the date when goods should have been delivered. By this amendment if parties so agree the period of one year would be extended. The proviso, however, restrict the said extension even with the agreement by the parties only for the period not more than three months by the Court. This specific provision made it clear that if parties so agree then only period of limitation would be extended beyond one year and not otherwise. There is no other provision whereby any liberal interpretation in condoning the delay in filing such suit has been incorporated. Therefore, such suit for loss and damage must be filed within one year after delivery of the goods or the date when the goods should have been delivered subject to a proof of

above extention, if any.

31. Further question is whether the allegation of fraud itself is sufficient to override the mandate of the Sea Act and its provisos in respect of transactions in question. The Apex Court in N. Khosla V/s. Rajalakshmi - J.T. 2006 (3) S.C. 200 based on an earlier judgment in S.P. Chengalraya Naidu (dead) V/s. Jaganath J.T. 1993 (6) 331: 1994(1) S.C.C. reiterated that -

"Fraud avoids all judicial acts. A decree obtained by playiang fraud is a nullity and it can be challenged in any ciourt, even in collateral proceedings".

Therefore, if case is based on fraud, such issue can be agitated at any stage in any proceeding. The allegation of fraud, false and fabricated documents cannot be decided at this stage of the proceeding without due and proper evidence. If the present suit is based on the damages as alleged on foundation of fraud and forged documents, then such suit may be maintainable and it is not beyond period of limitation as per Entry 10 of Part II of the Schedule of the Limitation Act. The alleged false and fabricated bill of lading and its date 31st March, 2003 which plaintiff came to know on 21st April, 2003 is sufficient to save the bar of limitation.

32. The BOL is a memorandum signed by the owner or master of the shipper in which the goods are embarked acknowledging the receipt thereof, the condition of carrying and undertaking to deliver at the end of the voyage. It is a document of title and a mere assignment thereof to pass the title of the assigner to the goods and also amounts to a constructive delivery of the same. It is usually issued by the carrier to the shipper. In the present case the Act and the Schedule thereto attracts as there was the BOL issued between the plaintiff and defendant Nos. 1 & 2. There was no specific bill of lading issued between plaintiff and defendant Nos. 3 & 4.

33. The bill of lading has three basic elements.

(a) A receipt for the goods having terms of which they have been received.

(b) It is an evidence of the contract for carriage of goods.

(c) It is document of title for the goods verified therein.

34. The BOL is an evidence to establish the fact that the goods were actually put on board and were received by the master of the ship. Therefore, unless proved otherwise the contents and details mentioned in

the BOL is presumed to be true and correct. The BOL is a conclusive statement of a contract between shipper and ship owner, unless proved otherwise. In absence of fraud and mischief it is the evidence of contract. It may not be itself a conclusive contract between the parties. Therefore, it is also clear that the facts and circumstances of each case need to be scrutinised before arriving at any conclusion relating to the transaction based upon the bill of lading or such contract between the parties.

35. The Apex Court in the case of East & West Steamship Co. (Supra) has interpreted the unamended Sea Act and Schedule - Article III Rule (6) in reference to the issue of limitation. We are concerned now in view of 28 of 1993 Amended Act. In view of the amended provision, if party agrees, the said period of limitation could be extended. However, it should not be later than three months.

36. The fraud unravels all. The law is very clear as laid down by the Apex Court that a party can bring out and or challenge any order of contract or benefit by any party by playing a fraud. The fraud committed by a third party also need to be considered on equal footing if connected with the transactions between the parties to the litigation or suit. Specially, the

case in hand, where the wrong date on BOL, as alleged, caused great loss to the plaintiff. Considering the nature of the transaction based on a contract of sale of goods and thereafter the carriage of goods in such transaction by sea, this mode of transportation definitely has an international characteristics. The date of BOL is very important in such transactions. As this date of bill of lading connect the transaction and the parties in the contract of carriage, in the contract of sale, and in relation to the banks, as payment was made under the letter of credit. When the payment is arrange under a letter of credit, a correct date on the letter of credit is very important. In the present case, the date, as agreed is relevant for all the purposes for the issues. Therefore any such mistake or misdating cannot be overlooked. Apart from plaintiff's allegation of fraud as referred above, defendant No. 5 the Shipping Corporation of India Limited had taken out third party proceedings against defendant No. 1 and claimed that defendant No. 5 is entitled to claim an amount of USD 276704.14 from the plaintiff inter-alia on the ground that under the instructions of said third party, the goods were despatched with the Stamp "clean on board" and thus defendant No. 5 if made liable to pay the claim,

plaintiff will be entitled to recover the said amount from the said third party. There was no reply, affidavit filed to the said third party notice. By an order dated 26th April, 2006, therefore a learned Single Judge has observed that "the claim raised by defendant No. 5 can be determined only on the hearing of the said third party notice when the suit is heard". The third party notice was accordingly made absolute along with suit. The third party has been permitted to file written statement within a period of four weeks to the claim made by the 5th defendant. The issues raised by the third party should be determined at the hearing of the suit in accordance with the law.

37. The averments made in the said affidavit by defendant No. 5 has also foundation of criminal complaint dated 15th September, 2004 against defendant No.1. and other Board of Directors of defendant No. 1 including other agents and officers for wrongful gain made by them. The criminal complaint has been under Section 420, 465, 467 and 468 r/w Section 120 (b) and Section 34 of the I.P.C. for wrongful gain. This facet also plays very important role in deciding the allegations of fraud as raised by the plaintiff, which has been duly endorsed by defendant No.5. As

these allegations of fraud are revolving around BOL in question between the parties and unless it is decided by due trial, I am not inclined to consider the case of defendant Nos. 3 & 4 as prayed in this Notice of Motion to dismiss the suit against them being barred by the law of limitation. It is very clear from the averments that plaintiffs' claim is not exclusively based on the issues covered by the BOL. The allegation of fraud and the damages as claimed, based on BOL, itself is the basic foundation of the fraud. It is true that plaintiffs need to prove the allegations of fraud. But considering the facts and circumstances in the present case, at this stage, without due enquiry and investigation and trial, the suit against defendant Nos. 3 & 4 cannot be dismissed on the ground of limitation. The fraudulent act of the parties to the transaction and or of the third parties vitiate and nullify the transaction, if proved.

38. The period of limitation under the Limitation Act 1963 as per Entry 10 of Part II of Schedule is three years and not one year. The suit is within limitation from the date of discovery of the fraud in question. In the present facts and circumstances of the case, the issues of limitation as raised by

defendant Nos. 3 & 4 are mixed questions of fact and law and cannot be determined on the basis of such application without evidence and trial of the suit. Admittedly, defendant Nos. 3 & 4 have not filed written statement till this date.

39. The Apex Court in **Gunwantbhai Mulchand Shah & Ors. V/s. Entol Ellis Farel & Ors., 2006 AIR SCW 1377** has observed that the question of limitation, if requires determination on the terms of agreement and the evidence produced by the parties, the dismissal of the suit as barred by limitation is not proper. In the present facts and circumstances of the case I am inclined to observe in the present matter also that all the issues arising in this matter including the issue of limitation need to be decided after giving the parties an opportunity to adduce evidence, in support of their respective case.

40. There is nothing on record to suggest that there was any agreement between the parties to extend said period of limitation after expiry of one year as contemplated under the amended Act and the schedule. But as provided, the agreement is necessary for an extension of period of limitation, atleast for further three months and or not later than three months, this itself means the filing of such suit for damages

within one year from the date of delivery of goods or from the proposed date of delivery has been extended for three months, in such a given case. All those cases referred above and cited by defendant Nos. 3 and 4 are based on the unamended provision of the Act. The amended provision now provides power to the parties to extend the period of limitation for further three months. This itself means that the terms of the bill of lading may not be extinguished the rights of the parties to file a suit even if not filed within one year after the date of delivery of the goods or from the date when goods should have been delivered. The parties can waive such rights. The parties can negotiate the transactions. The parties may agree orally or in writing or even by impliedly, to extend the period of limitation. Therefore, these aspects of agreement between the parties, cannot be decided at this stage of the proceeding. This needs evidence, material & trial.

41. In the present case based on the alleged back dated BOL in question, the plaintiff has suffered loss in view of unequivocal letter of indent/ bank guarantee executed between the parties. The said BOL and the bank documents, resulted into release of payment to the defendant even though, the goods were

not at all shipped as per original contract before 31st March, 2003. There was no intimation of any such consignment received by the plaintiff even by 7th April, 2003. The contract was terminated on 14th April, 2003. On 21st April, 2004 they received intimation about the consignment. The plaintiff, thereafter, found/discovered about said back dated BOL in question and therefore file the suit. These facts read with the allegations of fraud, as endorsed even by defendant No. 5, sufficient to discard the contention to dismiss the suit as barred by law of limitation.

THE CONCLUSION :-

42. The Apex Court in the case of Mayar (H.K.) Ltd. V/s. Owners & Parties, Vessel M.V. Fortune Express - JT 2006 S.C. 48 = 2006 (3) SCC while considering the provisions of Section 2 of Schedule Article III (6) of the Act and Order VII Rule 11-A of C.P.C. observed as under :-

> "Under Order VII Rule 11 of the Code, the Court has jurisdiction to reject the plaint where it does not disclose a clause of action, where the relief claimed is undervalued and the valuation is not correct within a time as fixed by the court, where insufficient court fee is paid and the additional court fee is not supplied within the period given by the court, and where the suit appears from the statement in the plaint to be

barred by any law."

"In **Popat and Kotecha Property V/s. State Bank of India Staff Association** JT 2005 (12) SC 302 = (2005) 7 SCC 510, this Court has culled out the legal ambit of Rule 11 of Order VII of the Code in these words :

"There cannot be any compartmentalization dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import".

"(11) From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of allegations made by the defendant in his written statement or in an application for rejection of the plaint. The court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the court exercising the powers under Order VII Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated out not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in

> the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order VII Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants."

THE CONCLUSION :-

43. In view of above observations of the Apex Court & in the facts and circumstances of the case, the averments made in the plaint read with the third party notice negotiated by respondent No. 5 and as the controversy revolves around the date of BOL, including the allegations of fraud and mis-representation, I am not inclined to consider the contentions as raised by defendant Nos. 3 and 4 in support of their Notice of Motion and specifically prayer clause (b) to dismiss the suit as barred by law. Therefore, considering the tenure and terms of the averments taken as a whole, the plaint cannot be dismissed by exercising power under Order VII Rule 11 of C.P.C. Taking all these into account, present Notice of Motion is dismissed.

44. Defendant Nos. 3 and 4 are directed to file written statement within eight weeks from the receipt of copy of the order.

45. No order as to costs.

46. Parties to act on a copy authenticated by

Associate of this Court.

[ANOOP V. MOHTA, J.]